82-1180

No.

Supreme Court, U.S.
FILED
JAN 14 1983
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

CARMEN DORANZO,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STANFORD SHMUKLER
Twelfth Floor
1314 Chestnut Street
Philadelphia, PA 19107
(215) 732-3400
Counsel for Petitioner Doranzo

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

QUESTIONS PRESENTED

1. Where the owner of premises is apprehended on a public street at the end of an alley some distance from the premises and is required to return to the premises, to open those premises and to remain on the premises during a lengthy search of those premises, does this exceed the limited detention permitted under this Court's decision in *Michigan v. Summers*, and the limited restriction of freedom of movement authorized by *Terry v. Ohio* and its progeny?

2. Where two declarants have given unsworn statements inculpating Petitioner, but have later recanted those statements, and then when called as Government witnesses have properly invoked their Fifth Amendment rights not to testify, does testimony by agents summarizing their statements, admitted under Federal Rule of Evidence 804(b)(3), violate the Confrontation Clause of the Sixth Amendment?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND FEDERAL RULE OF EVIDENCE INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	10
I. The Owner of Premises Cannot Be Apprehended on a Public Street Some Distance From His Residence and Be Required to Return to the Premises, to Open Them and to Remain During a Lengthy Search of Those Premises	10
II. Admission at Trial of Summaries by Government Agents of Unsworn Statements by Two Declarants Who Recanted Those Statements and Invoked Their Constitutional Privilege Not to Testify at Trial Violates the Petitioner's Constitutional Right of Confrontation	15
CONCLUSION	21
APPENDIX A:	
Court of Appeals Judgment Order	A1
APPENDIX B:	
District Court Orders Denying Pre-Trial Motions and Bench Opinion	A3
APPENDIX C:	
Judgment and Probation/Commitment Order	A9

TABLE OF AUTHORITIES

Cases:	Page
Chimel v. California, 395 U. S. 752 (1965)	11
Coolidge v. New Hampshire, 403 U. S. 443 (1971)	11, 12, 13
Dunaway v. New York, 442 U. S. 200 (1979)	11, 13, 14
Dutton v. Evans, 400 U. S. 74 (1970)	17
Lawson v. Kolender, 658 F. 2d 1362 (9th Cir. 1981)	13
Michigan v. Summers, 452 U. S. 692 (1981)	i, 10, 12, 13, 14
Miranda v. Arizona, 384 U. S. 436 (1966)	11, 13, 14
Ohio v. Roberts, 448 U. S. 56 (1980)	17
Olson v. Green, 668 F. 2d 421 (8th Cir. 1982)	19
Payton v. New York, 445 U. S. 573 (1980)	14
Reid v. Georgia, 448 U. S. 438 (1980)	11, 13
Sharpe v. United States, 660 F. 2d 967 (4th Cir. 1981)	14
State v. Parris, 32 Cr. L. 2261 (Wash. Supr. Ct. Nov. 24, 1982)	20
Steagold v. United States, 451 U. S. 204 (1981)	14
Terry v. Ohio, 392 U. S. 1 (1968)	i, 11, 13, 14, 15
United States v. Alvarez, 584 F. 2d 694 (5th Cir. 1978)	20
United States v. Bagley, 537 F. 2d 162 (5th Cir. 1976)	20
United States v. Barnett, 539 F. 2d 244 (1st Cir. 1976)	19
United States v. Bautista, 684 F. 2d 1286 (9th Cir. 1982)	13
United States v. Clay, 640 F. 2d 157 (8th Cir. 1981)	14
United States v. Garris, 616 F. 2d 626 (2nd Cir. 1980)	19
United States v. Harley, 682 F. 2d 398 (2nd Cir. 1982)	13
United States v. Lang, 589 F. 2d 92 (2nd Cir. 1978)	19
United States v. Layton, 11 Fed. Rules Evid. Serv. 21 (N. D. Calif. Jan. 11, 1982)	19
United States v. MacDonald, 688 F. 2d 224 (4th Cir. 1982)	20
United States v. Martell, 654 F. 2d 1356 (9th Cir. 1981)	13
United States v. O'Connor, 658 F. 2d 688 (9th Cir. 1981)	13
United States v. Palumbo, 639 F. 2d 123 (3rd Cir. 1981)	18
United States v. Riley, 657 F. 2d 377 (8th Cir. 1981)	18
United States v. Sarmiento-Perez, 633 F. 2d 1092 (5th Cir. 1981)	20

TABLE OF AUTHORITIES (Continued)

Cases (Continued): Page

United States v. Stevens, 533 F. Supp. 929 (N. D. Ill. 1982) 14
United States v. Timpani, 665 F. 2d 1 (1st Cir. 1981) 13
United States v. Underwood, 32 Cr. L. 2254 (9th Cir. Dec. 7, 1982) 14
United States v. Ward, 682 F. 2d 876 (10th Cir. 1982) 15
Ybarra v. Illinois, 444 U. S. 85 (1979) 11, 13, 15

Constitutional Provisions:

Fourth Amendment 3, 11, 14
Fifth Amendment .....i, 2, 3, 8, 15, 17
Sixth Amendment .....i, 3, 15, 17, 18, 21

Federal Rules of Evidence:

Rule 804(a)(1) 17
Rule 804(b) 3, 15
Rule 804(b)(3) .....i, 4, 15, 18, 21

Federal Rules of Criminal Procedure:

Rule 12(d) 19

Miscellaneous:

28 U. S. C. § 1254(1) 2

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CARMEN DORANZO,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Carmen Doranzo, your Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on November 15, 1982.

OPINIONS BELOW

On November 15, 1982 the United States Court of Appeals for the Third Circuit entered a Judgment Order, which has not been officially reported, but is reproduced in Appendix A, *infra,* pages A1-A2, affirming the judgment of conviction and sentence entered by the United States District Court for the Eastern District of Pennsylvania on February 12, 1982. On that date, the Honorable James T. Giles, Judge of that Court, had sentenced Petitioner to a term of imprisonment for three years, followed by probation for five years, and a fine of $10,000. On December 14, 1981 Judge Giles had filed Orders denying Pre-Trial Motions to quash the indictment for alleged violation of the Fifth Amendment, and made findings of fact and conclusions of law from the Bench, none of which have been officially reported, but which are reproduced in Appendix B, *infra,* pages A3-A8. A copy of the Judgment and Probation/Commitment Order is reproduced herein as Appendix C, *infra,* pages A9-A10.

JURISDICTION

The Order of the United States Court of Appeals for the Third Circuit (Appendix A, *infra,* pages A1-A2) affirming the judgment of the District Court, was entered on November 15, 1982. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL RULE OF EVIDENCE INVOLVED

The United States Constitution provides in pertinent part:

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall * * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right * * * * to be confronted with the witnesses against him . . . .

The Federal Rules of Evidence provide in pertinent part:

RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

* * *

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * * *

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

• • • •

STATEMENT OF THE CASE

Petitioner Carmen Doranzo was indicted on September 10, 1981 in eleven counts of an indictment, nine of which charged him with attempting to evade excise taxes due for nine separate months during the period of December, 1976 to May, 1978 by failing to file required excise tax forms (Form 730), failing to pay the excise tax, and engaging in other acts which were designed to evade and defeat the tax. The two remaining counts charged him with attempting to evade the annual special occupational tax imposed on persons engaged in the business of accepting wages, for the periods of December 1, 1976 through June 30, 1971 and July 1, 1977 through June 30, 1978, by failing to file the special tax return and application for registry-wagering (Form 11C) and wilfully failing to pay the special occupational wagering tax. Motions to quash the indictment and to suppress evidence were filed, and a hearing was held during which the Petitioner testified concerning the circumstances of service of the search warrant by the Philadelphia Police in December, 1976. The Government called Philadelphia Police Officer James Mitchell who contradicted the Petitioner's version, and the Petitioner was called in rebuttal. Decision was reserved, and when the case was called for trial approximately six weeks later, the trial Judge announced his decision, denying the motion to quash the indictment and denying the motion for suppression of evidence, entering written Orders and making findings of fact from the Bench. Appendix B, *infra*, pages A3-A8. Following a jury trial, the Petitioner was found guilty on all eleven counts. Timely post-trial motions were filed and denied, and on February 12, 1982, Petitioner was sentenced to imprisonment for three years and fined $10,000.00 on one count, and placed on probation for five years on the remaining counts. A timely appeal was filed and the Court of Ap-

peals for the Third Circuit affirmed, entering a Judgment Order on November 15, 1982.

Pertinent evidence offered at the motion to suppress showed that in December, 1976, as Petitioner left his premises at 3151 N. 22nd Street in Philadelphia, exited the alley behind the premises and was walking to his car at 22nd Street and Allegheny Avenue, also in Philadelphia, a warrant was served on him by the Philadelphia Police. He was told that the Police had a warrant to search the premises, but he told them he would not go back. They thereupon searched him and took his keys, marched him back to the place, opened the padlock, opened the door, and went in. According to Petitioner they told him that he was going back whether he liked it or not, and they "hassled" him and pushed him back to the door. When he refused to open it, they told him that he had better open the door or they would chop it open. They finally opened the door with the keys which they had taken from him. The Government's witness, Police Officer Mitchell, on the contrary testified that at 6:30 P. M., after the Officers had parked their cars and were walking on Allegheny Avenue, they observed the Petitioner exiting from an alley. They approached him and informed him that they had a search and seizure warrant, presented him with a copy of the warrant, whereupon he agreed to go back to the premises without any problem. Officer Mitchell testified they frisked him, but did not take his keys, and that he opened the door of the basement with those keys. During cross-examination, Officer Mitchell admitted that he had no probable cause to search Petitioner but denied searching him; he stated that he merely frisked him, or patted him down for weapons. There were six other officers present at the time. He did not remember feeling any keys in Petitioner's pockets, and did not recall whether they were on his person, in his hand or in his briefcase.

They did not find any weapon. To the best of his knowledge, no other officer patted down the Petitioner and no other officer had any conversation with him pertaining to the warrant prior to proceeding to the door. He heard no one say anything about the door being chopped down if it were not opened by the defendant. Neither he nor any other officer had any instruments with which to chop down the door. According to Mitchell, if they had not come across Mr. Doranzo, they would have banged on the door and waited for Doranzo to answer. Although he admitted that in the search warrant and in the information he gave to the federal authorities he had said that the doors were heavily fortified, he claimed that he had brought along nothing to enter the doors if he were not let in. In rebuttal, Petitioner testified that the Officers had sledge hammers and crowbars with them. The trial Judge chose to credit the police officer that Petitioner had not been coerced, that Petitioner had a reason to give over the keys to avoid destruction of the door, and that there was a valid search warrant, so that the doors could have been opened without the keys.

The testimony at trial included the testimony of an Internal Revenue Service Special Agent who audited returns for Petitioner for the year 1970. Although he had no contact with Petitioner, his testimony was offered to show that Petitioner had previously filed returns and was therefore aware of the requirement for filing returns, even though there had been a period of time during which the statute had been held unconstitutional. A witness from the IRS Taxpayer Relations testified to certificates of assessment showing that there were no returns for Petitioner during the periods in question.

There was testimony offered about two separate seizures of evidence. The first occurred in December 1976. Philadelphia Police Officer Mitchell testified to the

execution of the search warrant for the premises 3151 N. 22nd Street in December, 1976, at which time in the basement they found a desk containing two phones, a light, rulers, pens, pencils, papers, an adding machine, and a grocer's stick, which they used to reach into the ceiling over the bathroom where they found approximately 100 sheets of paper, which the officer later identified as gambling records, as well as $6700.00 in cash.

The second took place in May 1978. One female agent of IRS participated in a surveillance of the premises 3151 N. 22nd Street in April, 1978, observing Petitioner depositing bags at the curb. That agent also participated in the search of the premises on May 1, 1978 at which time they found a slip of paper with several phone numbers, including one for the name of Brown. Among the items seized at the premises were checks, one of which was payable to Andrew Brown. She later called Brown using a fictitious name, identifying herself as an office worker for Petitioner. Another criminal investigator for the IRS participated in surveillance during January to April, 1978, grabbed trash bags on April 17, 1978, and participated in the execution of the search warrant on May 1, 1978. Still another IRS special agent participated in surveillance activities during January to May 1, 1978 and assisted in executing the search warrant on May 1, 1978. During the execution of a search warrant for defendant's auto on May 1, 1978, there were four checks seized which were drawn on the account of a corporation, one of which was payable to Gwendolyn Robinson. Also found in the trunk of the car was a Budd Co. retirement check payable to Andrew Brown.

Gwendolyn Robinson and Andrew Brown were called by the Government, but both requested counsel and invoked their constitutional right not to testify under the Fifth Amendment. Thereafter, two Special Agents testi-

fied to the substance of their conversations with Brown and Robinson, each of which statements were damaging to Petitioner Doranzo. In addition, a Questioned Document Analyst for the IRS identified handwriting on various records as being that of Petitioner, and a Special Agent testified as an expert concerning bookmaking operations.

After the Government rested, the defense offered no evidence, but moved for a judgment of acquittal which was denied; the jury verdict followed.

REASONS FOR GRANTING THE WRIT

I. The Owner of Premises Cannot Be Apprehended on a Public Street Some Distance From His Residence and Be Required to Return to the Premises, to Open Them and to Remain During a Lengthy Search of Those Premises.

Although there was some dispute in the testimony concerning the circumstances of execution of the search warrant on the premises 3151 N. 22nd Street in Philadelphia in December, 1976,[1] there is no dispute that this case represents a question which falls between the limits set by this Court in two separate lines of cases delineating the rights of law enforcement officers serving a search warrant to restrict the freedom of movement of persons not the subject of the search warrant.

In *Michigan v. Summers*, 452 U. S. 692 (1981), decided little more than one year ago, this Court ruled that law enforcement authorities with a warrant to search a building can require the owner of the building who is descending the front porch steps to return with them to

1. There was also a May, 1978 search which involved similar issues. In May, 1978 there were several search warrants, naming the defendant, his premises, and his car, pursuant to which he was apprehended again after he had left the premises and was leaving the alleyway. This time there was no dispute that he refused to return to the premises, and he was searched, and keys were seized from him. The keys were then used to gain entrance to an outer door, but the law enforcement officials had to push their way into an inner door when the occupants refused to let them in. Since the issues involved in this search are similar to the December, 1976 search, with two added issues—namely, whether the search warrant was broad enough to encompass keys, and whether the officers properly announced their identity and purpose before entering the premises—this Petition will not be unduly lengthened by expounding on that search.

the building, and to give them assistance in gaining entry into the building, detaining him for a short time while they execute the warrant to search the premises. On the other hand, in a long line of cases, this Court has prohibited the arrest or the search of an individual by law enforcement officials on the open street without a search warrant for his person or without probable cause to make an arrest or a search. Thus, in *Miranda v. Arizona*, 384 U. S. 436, 444, 478 (1966), this Court concluded that a person is considered to be in custody when he is deprived of his freedom by the authorities in any significant way. Then, in *Terry v. Ohio*, 392 U. S. 1 (1968), this Court authorized a brief on-the-spot stop on the street and frisk for weapons, but not a search for contraband. In *Ybarra v. Illinois*, 444 U. S. 85 (1979), this Court bolstered that conclusion. Other decisions since the *Miranda* and *Terry* cases have ruled out the use of evidence obtained subsequent to such a deprivation of freedom. In *Dunaway v. New York*, 442 U. S. 200 (1979), this Court held that custodial questioning on less than probable cause for an arrest violated the Fourth Amendment, even though Petitioner was not formally placed under arrest. In *Reid v. Georgia*, 448 U. S. 438 (1980), this Court again held that searches and seizures not supported by some objective justification, including seizures that involve only a brief detention short of traditional arrests, are invalid.

In *Coolidge v. New Hampshire*, 403 U. S. 443 (1971), this Court had held that a search of a car parked in a driveway outside a house was not incident to the arrest in that house of the owner of both the house and of the car, since the search was not substantially contemporaneous with the arrest and was not confined to the immediate vicinity of the arrest. The Court, quoting numerous cases prior to *Chimel v. California*, 395 U. S. 752 (1965), said:

> "These cases make it clear beyond any question that a lawful pre-Chimel arrest of a suspect outside his house could never by itself justify a warrantless search inside the house. There is nothing in search-incident doctrine (as opposed to the special rules for automobiles and evidence in 'plain view' to be considered below) that suggests a different result where the arrest is made inside the house and the search outside and at some distance away. [Footnote omitted]" 403 U. S., at 456-457.

The case at bar poses the obverse situation, that is, whether a search warrant for a house justifies the apprehension and virtual arrest of the owner of the premises outside and at some distance away from the premises.

In the case at bar, under the Government's testimony, Petitioner was stopped as he exited from an alley behind his house onto Allegheny Avenue, where he was later taken back to his premises which were located at 3151 N. 22nd Street (at the end of the aforesaid alley). According to the Officer's testimony, they frisked him first, but did not take the keys from him, and he went back and opened the door with those keys. Under these facts, the question is nonetheless squarely posed whether *Summers* extends to permit the law enforcement officials to stop Petitioner some distance from the premises for which they have a search warrant, to bring him back to those premises (even though he was not named in the warrant as the person to be searched and even though they had no arrest warrant for him and no probable cause to arrest him), and to detain him during a lengthy search of the premises.

On the other hand, on the testimony of Petitioner, he was stopped on the public street, after exiting the alley, was apprehended and his freedom of movement restricted, he was searched and keys were taken from him, he was forced to return and to open the door to his premises with

those keys. Under those facts, the question is posed whether this conduct constitutes a restriction of freedom amounting to an arrest under *Miranda*, and exceeds the permissible limits established in *Terry, Ybarra, Dunaway, Reid, Coolidge* and its progeny.

The Circuit Courts which have had occasion to consider *Summers* are divided in their interpretation and application of that case. The First, Second and Ninth Circuits have all ruled that *Summers* sustains warrantless searches: See, *e.g., United States v. Timpani*, 665 F. 2d 1 (1st Cir. 1981) (agents executing a search warrant required appellants to remain with them for 45 minutes during five hour search, refusing to allow him to telephone his lawyer or anyone else; court sustained introduction of such evidence); *United States v. Harley*, 682 F. 2d 398 (2nd Cir. 1982) (agents having premises under surveillance followed defendant who entered and left, stopped his car, chased and searched him; court sustained search); *United States v. Bautista*, 684 F. 2d 1286 (9th Cir. 1982) (police officers responding to radio call about bank robber frisked defendant about half mile from the scene of the robbery, and arrested him when he gave answers inconsistent with another defendant stopped along with him; handcuffing, frisk, continued detention and interrogation sustained under *Summers*); *United States v. O'Connor*, 658 F. 2d 688 (9th Cir. 1981) (agents followed person who left hotel room under surveillance, stopped his cab, searched him and seized a briefcase; court found probable cause for seizure distinguishing *Summers*); *United States v. Martell*, 654 F. 2d 1356 (9th Cir. 1981) (detention of suspects for four hours at airport while search warrant for suitcases was obtained was sustained as not being constitutionally unreasonable). Compare *Lawson v. Kolender*, 658 F. 2d 1362 (9th Cir. 1981) (California vagrancy statute held unconstitutional); court cited *Summers* as standing for a proposition that pat-down can be a degrad-

ing experience, especially when conducted in public view, but in the absence of weapons, it lacks collateral consequences). But see *United States v. Underwood*, 32 Cr. L. 2254 (9th Cir. Dec. 7, 1982), in which the court concluded that absent exigent circumstances, the Fourth Amendment requires police to obtain a search warrant before making a nonconsensual entry to effect an arrest in anyone's home. In so holding, the court rejected the contrary suggestion of this Court in *Payton v. New York*, 445 U. S. 573 (1980) and *Steagold v. United States*, 451 U. S. 204 (1981).

On the other hand, the Fourth Circuit seems to have arrived at a contrary conclusion. In *Sharpe v. United States*, 660 F. 2d 967 (4th Cir. 1981) an investigative stop of an auto and a truck speeding on a highway, followed by detention without probable cause for arrest for 30 to 40 minutes, rendered the subsequent search unconstitutional. The dissenting Judge cited *Summers* as establishing a balancing test in examining the reasonableness in examining the search and seizure.

In *United States v. Stevens*, 533 F. Supp. 929 (N. D. Ill. 1982), a District Court sustained a limited detention of the occupants of premises while waiting for a search warrant, under the authority of *Summers*, but refused to permit the use of statements obtained during that detention, concluding that they were in custodial interrogation and entitled to *Miranda* warnings under *Dunaway*.

Finally, two other Circuits, although not citing *Summers*, have differed from the Third Circuit in their application of *Terry* under circumstances similar to the case at bar. In *United States v. Clay*, 640 F. 2d 157 (8th Cir. 1981), the Court ruled that law enforcement officials who had entered a house pursuant to a search warrant could not require a stranger, who had approached the house and knocked on the door, to enter the house and be

subjected to a *Terry* frisk. Likewise, in *United States v. Ward*, 682 F. 2d 876 (10th Cir. 1982), the Court held that agents who entered defendant's premises with a search warrant had no right to frisk and search the occupant of the premises without a reasonable suspicion that he was armed and presently dangerous, as required by *Terry* and *Ybarra*.

Thus, only this Court can decide and lay to rest a question of major importance which has led to much controversy in a short time and has divided the Circuits in their interpretations of this Court's decisions in delimiting the breadth of search warrants for premises.

II. Admission at Trial of Summaries by Government Agents of Unsworn Statements by Two Declarants Who Recanted Those Statements and Then Invoked Their Constitutional Privilege Not to Testify at Trial Violates the Petitioner's Constitutional Right of Confrontation.

The Sixth Amendment's guarantees of the right to confront witnesses have been limited by the adoption of various exceptions to the hearsay rules, such as that provided in Federal Rules of Evidence 804(b). In the case at bar, the Government attempted to introduce out-of-court unsworn damaging statements made by two Government witnesses who refused to testify at trial, properly invoking their constitutional rights under the Fifth Amendment not to incriminate themselves, after previously having recanted their statements. The Government invoked Federal Rule of Evidence 804(b)(3), which permits such statements if the declarant is unavailable and the statement is against the declarant's interest.[2]

IRS Agent Grabowski, who had participated in the raid on premises 3151 N. 22nd Street in May, 1978, at

2. For the full text of the Rule, see pages 3-4, *supra*.

that time found a slip containing the name Brown and a phone number in the apartment. On May 3, 1978, she called that number, spoke to someone whom she learned was Andrew Brown, identified herself with the fictitious name of Carol, and claimed to be an office worker for Carmen Doranzo. Brown stated he was a numbers writer for Doranzo, and that he had made payments to Doranzo during the previous week for numbers bets he had taken on behalf of Doranzo. One of those payments included a check for $202.48 issued to him by the Budd Company. That check had been found amongst the papers seized from Doranzo's Cadillac during the May 1, 1978 raid. Brown asked the Agent if he should destroy the numbers slips he had around the house; she told him to hold on to them. A search warrant was thereafter issued for Brown's premises and was served on May 3, 1978. A few weeks before trial, Brown repudiated his statements.

Another IRS agent, Zayas, testified that at the May 1 raid on premises 3151 N. 22nd Street, there were seized two other checks of the Hamilton Curtain Corporation, payable to Gwendolyn Robinson and two more to other persons. As a result, Agent Zayas and other agents interviewed Ms. Robinson at her home on May 11, 1978. She admitted being a numbers writer, writing out of her place of employment, the Hamilton Curtain Corporation. She identified those two checks as being her pay checks which she paid over in settlement of her weekly numbers obligation on the 25th or 26th of April to a woman named Maria who had recruited her. She also stated that the other two checks she had cashed for fellow co-workers and had paid them to Maria. She stated that she did not know Doranzo. A few weeks prior to trial, she also attempted to deny the statements which had previously been given to Agent Zayas.

The Government called Brown and Robinson at the time of trial, but both witnesses properly invoked their Fifth Amendment rights not to incriminate themselves. The Government then called the two agents who had questioned those witnesses to testify to the unsworn out-of-court statements made by those witnesses, each of whom had attempted to recant his or her statement. The Government recognized the confrontation problem, compounded by the recantations, and the defense persisted in its objection. Although the trial Judge at first reserved decision, the court finally admitted the evidence, concluding that the statements "were made under circumstances which insure their trustworthiness", at least insofar as the Brown statements were involved.

In the case at bar, it is conceded that both witnesses fall within the definition of unavailability set forth in Rule 804(a)(1) since they were exempted, by a ruling of the court on the ground of privilege, from testifying concerning the subject matter of their statements. However, that determination satisfies neither the Rule nor the Confrontation Clause of the Sixth Amendment: once a witness is shown to be unavailable, this Court has concluded that the Sixth Amendment countenances hearsay only if it bears adequate "indicia of reliability." *Ohio v. Roberts*, 448 U. S. 56, 65, 66 (1980). Once the Government has made a showing of necessity, it must demonstrate that the statements are reliable by meeting four factors set forth in *Dutton v. Evans*, 400 U. S. 74, 88-89 (1970): (1) whether the statement includes express assertions of past fact such as might lead the jury to give it undue weight; (2) whether the declarant had personal knowledge of the identity and role of the participants in the crime; (3) whether it was possible that the declarant was relying upon faulty recollection; and (4) whether the circumstances under which the state-

ments were made provided reason to believe that declarant had misrepresented the defendant's involvement in the case.

In the case at bar, the Government relies on the exception in Rule 804(b)(3) which presumes that a person making a statement so far contrary to his own pecuniary or proprietary interests, or subjecting him to civil or criminal liability, would not make such a statement unless he believed it to be true. Thus, the statement of Brown in the case at bar that he was writing numbers on behalf of Petitioner Doranzo was considered by the trial Judge to be against his interest; likewise, the statement of Robinson that she had been a numbers writer, although she did not know the Petitioner, was considered to be against her criminal interest. However, the Circuits which have attempted to define the meaning of a statement against interest, and to interpret the "indicia of reliability" and "guarantees of trustworthiness" required by the Confrontation Clause of the Sixth Amendment, have led to differing results. The Third and Eighth Circuits seem to impose strict requirements, while the First, Second, Fourth and Fifth have been broader in their interpretations.

In *United States v. Palumbo*, 639 F. 2d 123 (3rd Cir. 1981), a statement made by a declarant who was in police custody, in response to police questioning, identifying defendant as the source of drugs found in her possession, was found not to be against her interests, since the legal implications of her statement may have been unknown to her and she may have been motivated not to further truth, but to curry favor with the authorities. In *United States v. Riley*, 657 F. 2d 377 (8th Cir. 1981), the court excluded evidence of out-of-court statements made by a woman allegedly transported in interstate commerce for purposes of prostitution who was unavailable as a witness at trial,

noting that a statement admitting guilt and implicating another person made while in custody may well be motivated to curry desire with the authorities and hence fails to qualify as against interest. Compare *Olson v. Green*, 668 F. 2d 421 (8th Cir. 1982), where the declarant's two out-of-court statements in response to extensive police questioning were held to constitute a denial of defendant's constitutional right to confront the witnesses, but their admission in evidence was held to be harmless error in the case. Also see *United States v. Layton*, 11 Fed. Rules Evid. Serv. 21 (N. D. Calif. Jan. 11, 1982), in which Chief Judge Peckam gives a detailed analysis of the conflict between the Confrontation Clause and the hearsay exceptions to the Federal Rules of Evidence, in denying a Government motion under Rule 12(d) of the Federal Rules of Criminal Procedure for an Order allowing it to present evidence at re-trial of the case arising out of the killing in Guyana at the People's Temple Settlement in Jonestown. The court ruled that statements of Jones (who had died in Guyana) were not against his penal interest within the standards established by this Court. *Id.* at pages 35 to 38.

On the other hand, in *United States v. Barnett*, 539 F. 2d 244 (1st Cir. 1976), the court held that an inculpatory statement made by a witness which exculpated defendant was against penal interest, and the trial court should have gone on to determine whether it was corroborated by other evidence. And in *United States v. Lang*, 589 F. 2d 92 (2nd Cir. 1978), the court held that a statement by a witness to a person to whom he had recently sold counterfeit bills was against his interest, since it tended to subject him to criminal liability, even though he did not know he was incriminating himself. Also see *United States v. Garris*, 616 F. 2d 626 (2nd Cir. 1980), where the court permitted an F. B. I. agent to testify that

defendant's sister told him that defendant had admitted to her complicity in the robbery, since it shows she was an accessory after the fact and was therefore against her penal interest.

In *United States v. MacDonald*, 688 F. 2d 224 (4th Cir. 1982), the court found the statements to be against the declarant's penal interest, but did not find corroborating circumstances clearly indicating the trustworthiness of the statements. In *United States v. Bagley*, 537 F. 2d 162 (5th Cir. 1976), a prisoner in the U. S. penitentiary charged with possession of heroin testified that another inmate had given him the package of heroin, telling him that it contained valium. The other inmate had died. Defendant offered the testimony of a third inmate to testify to a statement by the deceased inmate that he had given the heroin to defendant by mistake. The court held that although the statement was sufficiently inculpatory to have the indicia of truth, it would not reverse the trial Judge's determination that the statement was not corroborated and not trustworthy. The court's opinion recognizes dissenting legal commentary setting out a contrary standard of trustworthiness. But compare *United States v. Alvarez*, 584 F. 2d 694 (5th Cir. 1978), holding that in-court testimony by a co-defendant of out-of-court statements by a decedent allegedly implicating defendant heard only by the declarant was held inadmissible either as a statement by a co-conspirator or as a declaration against penal interest; *United States v. Sarmiento-Perez*, 633 F. 2d 1092 (5th Cir. 1981), holding that custodial confession by non-testifying, separately-tried co-defendant, who was allowed to plead guilty to a limited number of counts, was not sufficiently contrary to his penal interest to render the statement admissible as a hearsay exception. Also see *State v. Parris*, 32 Cr. L. 2261 (Wash. Supr. Ct. Nov. 24, 1982), in which the court held that inculpatory

statements made to an informer and an undercover officer by a would-be drug seller, while the three were waiting for an accomplice to show up with the contraband, were properly introduced at the accomplice's trial through the informer's and officer's testimony, after the accomplice-declarant invoked his constitutional right against self-incrimination and was therefore unavailable for cross-examination.

For all of the aforesaid reasons, it is respectfully submitted that only this Court can lay to rest the confusion rampant within the Circuits as to the proper definition of a statement sufficiently against penal interest to justify a hearsay exception to the Confrontation Clause of the Sixth Amendment, as permitted by Rule 804(b)(3) of the Federal Rules of Evidence.

CONCLUSION

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted as to both of the questions presented herein.

Respectfully submitted,

STANFORD SHMUKLER,
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1130

UNITED STATES OF AMERICA

vs.

DORANZO, CARMEN,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Crim. No. 81-00273-01)

Submitted Under Third Circuit Rule 12(6)
November 15, 1982
Before: ALDISERT, SLOVITER, and ROSENN, *Circuit Judges.*

Judgment Order

After considering the contentions raised by appellant, to-wit, that: (1) the evidence seized pursuant to various searches should have been suppressed; (2) the unsworn statement of two witnesses who later repudiated those statements should not have been admitted as substantive evidence; and (3) there was no evidence other than failure to file returns necessary to sustain a conviction for willful attempt to evade taxes; it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

By THE COURT,

/s/ ALDISERT
Circuit Judge

Attest:
/s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk
DATED: Nov. 15, 1982

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 81-273

UNITED STATES OF AMERICA

v.

CARMEN DORANZO

Order

AND Now, this 14th day of December, 1981, upon consideration of defendant's motion to quash the indictment for alleged violations of the right against self-incrimination protected under the Fifth Amendment of the U.S. Constitution, and the government's response thereto, it is hereby ORDERED that the motion is DENIED per the Bench Opinion of this date.

By THE COURT:

/s/ JAMES T. GILES

J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 81-273

UNITED STATES OF AMERICA

v.

CARMEN DORANZO

Order

AND NOW, this 14th day of December, 1981, upon due consideration, defendant's Motion to Suppress is DENIED; per the Bench Opinion this date.

By THE COURT:

/s/ JAMES T. GILES
HONORABLE JAMES T. GILES
UNITED STATES DISTRICT JUDGE

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal Action No. 81-273

UNITED STATES OF AMERICA

vs.

CARMEN DORANZO

Philadelphia, Pennsylvania
December 14, 1981

Before: HON. JAMES T. GILES, *J.*,
and a Jury.

Volume I

APPEARANCES:

JOSEPH GONTRAM, ESQ. and
FRANK BOWMAN, ESQ.
Assistant United States Attorneys
for the Government

NEIL CARVER, ESQ.
for the Defendant

[1.2]

THE COURT: You have filed a motion to quash the indictment on the theory that the Pennsylvania tax statute on its face requires a taxpayer to turn over to the authorities of the State of Pennsylvania federal tax returns.

You allege that despite the federal statute, which operates to ensure that such returns will not be turned over to the state, that the Pennsylvania statute presents a real threat to the privilege against self-incrimination. I disagree and deny the motion.

The federal statute as enacted, addressed specifically the issue of protection of the individual's right against self-incrimination; that the Pennsylvania statute may have a provision that states that an individual might be required to do something does not at all mean that the state would or could require an individual to incriminate himself contrary to the protection of the Fifth Amendment. through the Fourteenth Amendment. So that is not a real threat to the privilege against self-incrimination.

The federal constitution remains intact and available to the defendant.

In accordance with this Bench Opinion, which I reserve the right to edit or expand upon, your

[1.3]

motion to quash the indictment is denied.

The second motion pertains to—strike that.

The second motion was a motion to suppress the fruits of the 1976 and 1978 searches pursuant to warrants. For the reasons which will follow those motions for suppression must be denied.

Respecting the 1976 severance, there was a validly issued warrant to search the premises. The defendant claims he was required to remain in the premises while this search was being conducted. This was not a viola-

tion of his constitutional rights. He claims, further, that he was required to give over keys against his will. I have heard the testimony on that and I credit the police officer that he was not coerced.

The defendant had a reason to give the keys over, that is to avoid the destruction of the door. Moreover, there was a valid search warrant for the premises. The door could have been opened without the keys, whether at that time or later.

A review of the warrant discloses that there was a valid basis for probable cause:

1. In 1978 the search warrant issued for the search of the defendant Carmen Doranzo for the

[1.4]

premises 3151 North 25th Street and for a 1977 Cadillac, registered to Antoinette Doranzo, each of these searches was pursuant to a separate warrant. A review of the warrants show that there was probable cause for each.

The affiant, Brooks states that he reviewed the 1976 materials seized in the search of the premises, formed an opinion in consultation with others, learned in the gambling processes that the materials seized then were gambling-connected or wagering-connected.

There was a search and a seizure of documents from trash bags in 1978 outside the premises, such bags being placed on the curb for trash collection. Those documents described by the affiant as containing wagering documents. Specifically numbers, settlement sheets, ribbons and settlement sheet's items commonly used in an illegal wagering business.

The affiant concluded that these documents were substantially similar to those seized in 1976, which were determined also to be wagering, illegal wagering or lottery documents. Hence, there was probable cause in that respect for the issuance of the 1978 search warrants.

Accordingly, the motion for suppression or the motions to suppress are denied.

[1.5]

The Court reserves the right to edit or expand the reasons for the denials.

Have I addressed the points raised by Mr. Carver?

MR. CARVER: I believe you have, your Honor.

On the record, I would take exceptions to your rulings.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

DOCKET NO. 81-273

UNITED STATES OF AMERICA

v.

CARMEN DORANZO,

Defendant

Judgment and Probation/Commitment Order

In the presence of the attorney for the government Joseph M. Contram the defendant appeared in person on this date, Feb. 12, 1982, with counsel, Neil Carver, Esq.

There being a verdict of GUILTY, defendant has been convicted as charged of the offense of tax evasion (26 USC § 7201).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS and defendant is directed to pay a Fine in the amount of TEN THOUSAND ($10,000) DOLLARS, said sentence is imposed on Count 1; on Count 2, defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment

for a period of THREE (3) YEARS and defendant is directed to pay a Fine in the amount of TEN THOUSAND ($10,000) DOLLARS, execution of the prison sentence on Count 2 is suspended and defendant is placed on PROBATION for a period of FIVE (5) YEARS, said sentence on Count 2 to run consecutively to the sentence imposed on Count 1; on each of Counts 3 to and including 11, the imposition of sentence is suspended and defendant is placed on PROBATION for a period of FIVE (5) YEARS which sentences of Probation are to run concurrently each with the other and concurrently with the sentence imposed on Count 2.

IT IS FURTHER ORDERED that execution of the prison sentence is suspended pending appeal.

Signed by

/s/ JAMES T. GILES
U.S. District Judge James T. Giles
Date 2/12/82

Office-Supreme Court, U.S.
FILED
APR 20 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1180

In the Supreme Court of the United States

OCTOBER TERM, 1982

CARMEN DORANZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

SARA CRISCITELLI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether evidence seized from petitioner's office pursuant to a valid search warrant should have been suppressed because petitioner, who was encountered on the street leaving the vicinity by officers arriving to execute the search warrant, agreed to return to his office and unlock the door.

2. Whether the district court abused its discretion in admitting inculpatory hearsay declarations against penal interest made by two unavailable declarants, where corroborating circumstances indicated the trustworthiness of the statements.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	2
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Michigan v. *Summers*, 452 U.S. 692	3-4
United States v. *Alvarez*, 584 F.2d 694	7
United States v. *Garris*, 616 F.2d 626	7
United States v. *Palumbo*, 639 F.2d 123	7, 8
United States v. *Riley*, 657 F.2d 1377	7

Statute and rules:

26 U.S.C. 7201	2
Fed. R. Evid.:	
Rule 804	6
Rule 804(b)(3)	6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1180

CARMEN DORANZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1982. The petition for a writ of certiorari was filed on January 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on 11 counts charging tax evasion, in violation of 26 U.S.C. 7201. Petitioner was sentenced to three years' imprisonment on count one, to be followed by concurrent terms of three years' imprisonment on the remaining counts. Imposition of the latter term was suspended in favor of five years' probation. Petitioner was also fined $20,000. The court of appeals affirmed in an unpublished judgment order (Pet. App. A1-A2).

The evidence at trial, the sufficiency of which is not in dispute, established that petitioner operated an illegal gambling and bookmaking operation between December 1976 and May 1978. During that period petitioner failed to file required excise tax forms or otherwise to pay excise and special occupational taxes relating to his gambling business. The evidence further demonstrated that petitioner was aware of his obligation to file returns and pay his taxes, because the government had on several previous occasions assessed him for back taxes.

ARGUMENT

1. Petitioner first contends (Pet. 10-15) that he was improperly detained by police officers executing a search warrant on his gambling premises in December 1976. This claim is without merit.

In December 1976 Philadelphia police officers obtained a warrant to search petitioner's office. According to the testimony of one of the officers at the suppression hearing, when they arrived to execute the warrant they encountered petitioner walking out of an alley near the premises. They approached him,

identified themselves, and presented petitioner with a copy of the warrant. Petitioner then agreed to accompany the officers back to the building. The officers patted down petitioner to see if he was carrying any weapons; finding none, they proceeded to the building. Petitioner took keys from his pocket and opened the steel door, permitting officers to enter and conduct their search (Supp. H. Tr. 7-8, 11, 18). That search uncovered gambling paraphernalia hidden in the ceiling (*id.* at 23).

Petitioner sought to suppress the gambling paraphernalia, claiming, *inter alia*, that it was the fruit of an unlawful seizure of his person. Petitioner testified at the suppression hearing. He agreed that he met the police officers by the alleyway, but testified that he refused to accompany the officers back to the building. He further stated that the officers searched him and took his keys from him, and that, under restraint, he was "marched" back to the building and detained there while the officers, using the keys they had forcibly taken from him, entered and conducted the warrant search (Supp. H. Tr. 4, 22).

The district court denied petitioner's suppression motion. The court specifically credited the officer's testimony that petitioner was not coerced and that the officers did not forcibly take his keys from his person, in preference to petitioner's contrary testimony. The court also observed that petitioner had good reason to consent to return to his office with the officers and to open the door, so as to avoid damage to his property from the forcible entry that might otherwise have taken place (Pet. App. A7; Tr. 1.3).

Because petitioner was found to have accompanied the officers and opened the door voluntarily, this case provides no occasion for the Court to consider whether under the rule of *Michigan* v. *Summers*, 452

U.S. 692 (1981), the occupant of premises that are the subject of a search warrant may be seized off the premises, brought back to those premises and detained while the search is conducted. The district court's determination, upheld by the court of appeals, that petitioner was not coerced into accompanying the officers is fact-bound and does not warrant further review. Any detention of petitioner that took place during the search of his office itself is plainly authorized under *Michigan* v. *Summers*, *supra*.

We note, in any event, that petitioner has never explained how any illegality in his detention would taint the evidence discovered in the warrant search of his gambling office. Because the officers had a valid search warrant, they had the authority to enter the premises with or without petitioner's consent, and with or without his keys. Accordingly, the gambling paraphernalia discovered in the office during the warrant search were not fruit of any illegality in his detention.[1]

---

[1] Petitioner mentions in passing (Pet. 10 n.1) his contention that a second entry of his premises pursuant to warrant, in May 1978, was defective in some unspecified respect. Petitioner did not present this contention in the district court, which accordingly did not hear evidence respecting this incident and made no ruling on it. (In district court petitioner did contend that the May 1978 search warrants were issued in the absence of probable cause and that the supporting affidavit was insufficiently specific. Those claims were rejected by the district court (Pet. App. A7) and by the court of appeals (*id.* at A1).) The government argued in the court of appeals (Br. 14) that petitioner had failed to preserve his separate contention that the May 1978 warrant was improperly executed. The court of appeals did not expressly address that claim. Plainly that contention is not properly before this Court.

2. Petitioner contends as well (Pet. 15-21) that the district court erred in allowing government agents to testify as to out-of-court declarations against penal interest tending to inculpate petitioner, made to the agents by two participants in petitioner's gambling operation, each of whom became unavailable to testify at trial because he or she invoked the privilege against self-incrimination. This claim is also without merit.

The first declarant admitted to a government agent, posing as an associate of petitioner, that he was a "numbers writer" for petitioner and that he had recently made payments to petitioner in that capacity (Tr. 4.57-4.59). This admission was corroborated by the discovery of the declarant's name and telephone number in items seized in a search of petitioner's premises. Other evidence seized at that time independently implicated the declarant as a numbers writer (Tr. 4.61-4.62). Additionally, a check for $202.48, which the declarant said he sent to petitioner as payment for wagers, was found in petitioner's car trunk (Tr. 4.58) Finally, the declarant admitted making payments to petitioner at an address established by independent evidence to be the location of petitioner's bookmaking operation (*ibid.*).

The second unavailable declarant admitted to two government agents that she was a numbers writer. Although she denied knowing petitioner, she admitted that she had given two checks that were proven by independent evidence to have been connected to petitioner's gambling operation to a third person in connection with gambling. She also described two other checks that she accepted as settlement for bets; the checks were found in petitioner's suitcase during a warrant search (Tr. 4.75-4.80, 4.82).

After careful consideration of the circumstances surrounding the statements (see Tr. 2.181-2.185; 3.2-3.6; 3.170-3.204; 4.2-4.18) the district court found (Tr. 4.18-4.20) that each statement was against the declarant's penal interest and was sufficiently corroborated and accompanied by indicia of trustworthiness to be received in evidence pursuant to Fed. R. Evid. 804(b)(3).[2]

Admission of this hearsay evidence was proper. First, it is undisputed that the two declarants were "unavailable" (see Pet. 17). It is similarly beyond doubt that the declarants' admissions subjected them to criminal liability. Petitioner merely urges that they lacked supporting "indicia of reliability" or "guarantees of trustworthiness." The district court, however, found otherwise, and there is no occasion for further review of that fact-bound determination.

The first declarant's admissions, unwittingly made to a government agent, were corroborated by independent evidence linking him to petitioner and to petitioner's gambling premises. And the first declarant obviously had no reason to curry favor with government agents when he made his statement. The statement of the second defendant was also substantially

---

[2] Rule 804 provides in pertinent part:

> (b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * * * *
>
> (3) A statement which * * * at the time of its making * * * so far tended to subject him to * * * criminal liability * * * that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

corroborated. Thus, although she knew that her questioners were government agents, the statements bore sufficient indicia of reliability to overcome the possibility that she was motivated to "curry favor" with the authorities at petitioner's expense. Indeed, that possibility is excluded here because the second declarant denied knowing petitioner at all.

The district court regarded the declarants' statements to be adequately corroborated and accompanied by indicia of trustworthiness, and the court of appeals agreed. Accordingly, this case provides no occasion for consideration of an alleged intercircuit conflict concerning admission of inculpatory declarations against penal interest.[3] None of the

---

[3] The alleged conflict, which may be more semantic than real, arises because Rule 804(b)(3) explicitly requires a finding of corroborating circumstances indicating trustworthiness as a condition for admission of declarations against penal interest offered to *exculpate* the defendant, but imposes no such explicit requirement as to declarations whose effect is *inculpatory*, such as those admitted in evidence here. Several courts of appeals—apparently impelled by Confrontation Clause concerns—have nevertheless held corroboration and indicia of trustworthiness to be required for inculpatory statements as well. Compare *United States* v. *Riley*, 657 F.2d 1377 (8th Cir. 1981); *United States* v. *Palumbo*, 639 F.2d 123, 131 (3d Cir. 1981) (Adams, J., concurring); and *United States* v. *Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978), with *United States* v. *Garris*, 616 F.2d 626, 629-633 (2d Cir. 1980). There is no occasion to consider any conflict here, for the district court found the declarants' statements to be corroborated and trustworthy. Moreover, as petitioner acknowledges (Pet. 18), the Third Circuit has adopted a relatively strict rule as to the admissibility of inculpatory declarations against penal interest. There is no indication that it did not employ that rule here. Accordingly, petitioner is not aggrieved by any difference among the courts of appeals respecting such statements.

cases cited by the petitioner requires exclusion in such circumstances.[4]

---

[4] In *United States* v. *Palumbo*, *supra*, the Third Circuit, examining the "totality of circumstances" of the case (639 F.2d at 127), found that the declarant's statements following discovery of cocaine on her person would not likely "tend[] to subject" her to additional criminal liability. Moreover, the court also found that the statement was made by the declarant while in police custody and thus could have been motivated by a desire to "curry favor with the authorities." *Id.* at 128.

A similar analysis was employed in *United States* v. *Riley*, *supra*. There the court of appeals found that although the out-of-court statement was technically against the declarant's penal interest, it subjected her to prosecution on a lesser offense than that in which the defendant was implicated. The court also found other circumstances present that suggested that the statement in question was not, on balance, contrary to the declarant's self-interest.

These cases, and others cited by petitioner (Pet. 19-20), merely illustrate the broad range of factors examined by courts in considering admissibility of inculpatory declarations against penal interest. None of these decisions, however, suggests that the statements at issue here were improperly received in evidence. Neither of the declarants was under arrest at the time he made his statement. While the second declarant, under questioning by the authorities, may have had reason to curry favor with them, she did not in fact specifically incriminate petitioner. The statements of each were well corroborated by other non-hearsay evidence, and there is no indication that either declaration was unreliable or untrustworthy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

SARA CRISCITELLI
Attorney

APRIL 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 404058 1332